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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE PENNSYLVANIA AVENUE FUNDS, Individually And On Behalf of All Others Similarly Situated, Plaintiff, vs. INYX INC., JACK KACHKAR, STEVEN HANDLEY, RIMA GOLDSHMIDT, JAY M. GREEN and BERKOVITS & COMPANY, LLP, Defendants.	Civil Action No. 08-cv-06857-PKC

MEMORANDUM OF LAW IN SUPPORT OF LEAD COUNSEL'S APPLICATION FOR AN AWARD OF ATTORNEYS' FEES <u>AND REIMBURSEMENT OF EXPENSES</u>

In connection with the Court's approval of the Settlement[1] in the above-captioned action (the "Action"), Court-appointed Lead Counsel respectfully move this Court for: (i) an award of attorneys' fees in the amount of one third (33.3%) of the Settlement Amount recovered on behalf of the Class; (ii) reimbursement of $105,594.24 in expenses that Lead Counsel[2] incurred in successfully prosecuting this Action, and (iii) interest earned on those amounts at the same rate as earned by the Settlement Fund from the date of the award to the date of payment.

I. PRELIMINARY STATEMENT

This Action was prosecuted by Lead Counsel on behalf of a class consisting of all purchasers of Inyx, Inc. ("Inyx") securities on the NASDAQ during the period from April 1, 2005 and July 2, 2007, inclusive (the "Class Period"), on a fully contingent basis, and through their efforts, have obtained a proposed cash settlement fund of between $600,000 and $1,100,000 (the "Settlement Fund" or the "Settlement")[3] for the benefit of the Class. This excellent result would not have been possible without the efforts of Lead Counsel who, despite the relentless opposition by Defendants, devoted nearly four years to the prosecution of this Action. Through an extensive and far-reaching discovery process, Lead Counsel were able to sufficiently develop their case to be ready for trial and to engage in extensive, complex and difficult settlement negotiations with Defendants on the literal eve of the trial to obtain the Settlement for the Class. Without Lead Counsel's skill, advocacy and diligent efforts in the prosecution and settlement of Plaintiff's claims, no recovery for the Class would have been obtained.

[1] This Memorandum incorporates by reference the definitions contained in the Stipulation and Agreement of Settlement (the "Stipulation") approved by this Court on February 9, 2012.

[2] "Lead Counsel" refers to the law firm Brower Piven, A Professional Corporation ("Brower Piven").

[3] As described in greater detail in the Stipulation, the exact amount of the Settlement Fund will depend both on the timing of Defendants' payments in satisfaction of the Stipulation and on whether or not Defendants realize any financial return in connection with certain intellectual property described in the Stipulation.

Lead Counsel are simultaneously submitting to the Court the Declaration of Plaintiffs' Lead Counsel David A.P. Brower in Support of Final Approval of Settlement, Plan of Allocation and Lead Counsel's Application for an Award of Attorneys' Fees and Reimbursement of Expenses (the "Brower Declaration"). The Brower Declaration fully describes the history of this Action, the claims asserted, the efforts of Lead Counsel, the complexity and risks associated with this Action, the legal obstacles to Plaintiffs' success on the merits, and the negotiations leading to the Settlement. As such, Lead Counsel respectfully direct the Court's attention to the Brower Declaration and will refrain from repeating herein the matters contained in the Brower Declaration. This memorandum will focus on the legal and factual standards applicable to attorneys' fees and expense requests.

As compensation for their efforts on behalf of the Class, as detailed in the Brower Declaration, Lead Counsel respectfully request that the Court award attorneys' fees in the amount of between $366,666.67 and $200,000.00 (depending on the final size of the Settlement Fund, *see* Brower Decl. ¶77), which is less than Lead Counsel's lodestar of $1,889,404.75 (*i.e.*, necessitating the application of a *negative* multiplier) and is one third of the Settlement Amount (the "Fee Request"). In addition, Lead Counsel request reimbursement of the out-of-pocket expenses incurred by Lead Counsel during the pendency of the Action in the amount of $105,594.24 (the "Reimbursement Request"). Lead Counsel also request interest earned on their Fee and Reimbursement Requests at the same rate as earned on the Settlement Amount from the date of the award until payment.

The percentage recovery method has been widely embraced by courts in this District, this Circuit and courts across the country as the best approach to calculating attorneys' fees. The Private Securities Litigation Reform Act of 1995 ("PSLRA") has also indicated its preference for

a percentage analysis when awarding attorneys' fees in securities class actions.[4] Additionally, courts also utilize a lodestar/multiplier analysis to award attorneys' fees or perform a "lodestar cross-check" to assess the reasonableness of a percentage fee request in cases, such as this one, where Lead Counsel incurred substantial fees litigating the matter. Under that analysis, where counsel assumes the risk of litigating a case on a contingency basis -- in this case for nearly four years -- courts recognize that counsel is typically entitled to a substantial premium or "multiplier" of their lodestar submission. *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 985 F. Supp. 410, 414 (S.D.N.Y. 1997) ("Because counsel who rendered services were not being compensated for their work as it was being performed and because of the significant risk that they might never receive any compensation if the action was unsuccessful, courts have, when warranted, applied a multiplier to the lodestar to arrive at a fair contingent fee."). Here Lead Counsel are not seeking a ***negative*** multiplier of their lodestar -- they are requesting an award that is ***less*** (approximately 81% to 89% less) than the amount of fees actually incurred.

Under either the percentage or lodestar/multiplier method of calculating fees, the ultimate objective is for the Court to arrive at an award that, in the Court's view, will fairly and reasonably compensate Lead Counsel for their successful efforts on behalf of the class. The instant Fee and Reimbursement Requests are premised on a number of factors, including the substantial result achieved for the Class, Lead Counsel's vigorous and skillful prosecution of the Class' claims, and the numerous and substantial risks undertaken, on a wholly contingent basis, by Lead Counsel during the course of nearly four years. For the reasons cited herein and the facts detailed in the Brower Declaration, Lead Counsel respectfully submit that the Fee Request is fully justified under the applicable law, and the expenses Lead Counsel incurred were

[4] The PSLRA states that, in class actions brought under federal securities law, "[t]otal attorneys' fees and expenses awarded by the court to counsel for the plaintiff shall not exceed a reasonable percentage of the amount" recovered for the Class. 15 U.S.C. § 78u-4(a)(6).

necessary and reasonable, and should be reimbursed. Further, following the dissemination of over 6,000 copies of the Notice of Proposed Settlement of Class Action (the "Notice"),[5] and notwithstanding both the Fee and Reimbursement Request are less than the amounts described in the Notice, Lead Counsel have yet to receive an objection to the Fee or Reimbursement Request by a member of the Class.[6]

II. LEAD COUNSEL'S REQUEST FOR ATTORNEYS' FEES SHOULD BE GRANTED

A. Lead Counsel are Entitled to an Award of Attorneys' Fees and Reimbursement of Expenses from the Common Fund

It is well established that where an attorney prosecutes a suit that results in the creation of a fund for the benefit of a class, the costs of the litigation, including an award of reasonable attorneys' fees, should be recovered from the fund created by the litigation. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also In re Interpublic Sec. Litig.*, Civ. 6527 (DLC), 2004 U.S. Dist. LEXIS 21429, at *30-*31 (S.D.N.Y. Oct. 27, 2004). This is known as the "equitable" or "common fund" doctrine. The Supreme Court has explained that the doctrine "allows a court to prevent . . . inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit." *Boeing*, 444 U.S. at 478 (citations omitted); *see also In re Veeco Instrum. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 U.S. Dist. LEXIS 85554, at *7 (S.D.N.Y. Nov. 7, 2007). "[A] traditional purpose of the common fund doctrine is to make 'fair and just allowances' to Lead Counsel." *Maley v. Del Global Techs. Corp.*, 186 F.

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[5] *See* Affidavit of Jose C. Fraga Senior Director of the Garden City Group, Inc. ("GCG") Regarding (A) Mailing of the Notice; (B) Publication of the Summary Notice; (C) Website; and (D) Requests for Exclusion Received to Date, the Court-appointed claims administrator for the Settlement (the "GCG Affidavit"), attached as Exhibit 1 to the Brower Declaration.

[6] The deadline for Class Members to file an objection to the Fee and Reimbursement Requests was April 9, 2012.

Supp. 2d 358, 369 (S.D.N.Y. 2002) (citing *Internal Imp. Fund Trustees v. Greenough*, 105 U.S. 527, 536 (1881)).

Courts also have recognized that in addition to providing just compensation, awards of attorneys' fees from a common fund also serve to (1) encourage skilled counsel to represent, on a contingency basis, those who seek redress for damages inflicted on entire classes of persons, and (2) discourage future misconduct of a similar nature. *See, e.g.*, *Dolgow v. Anderson*, 43 F.R.D. 472, 481–84 (E.D.N.Y. 1968); *see also Hicks v. Morgan Stanley & Co.*, No. 01 Civ. 10071 (RJH), 2005 U.S. Dist. LEXIS 24890, at *27 (S.D.N.Y. Oct. 24, 2005) ("Private actions to redress real injuries . . . could not be sustained if Lead Counsel were not to receive remuneration from the settlement fund for their efforts on behalf of the class."). Indeed, the Supreme Court has repeatedly emphasized that private securities actions, such as the instant action, provide a "'most effective weapon in the enforcement'" of the securities laws and are "'a necessary supplement to [SEC] action.'" *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) ("This Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the [SEC].").

B. The Standard for Approval of Attorneys' Fees in the Second Circuit

As discussed above, courts traditionally have employed two methods for calculating reasonable attorneys' fees in securities class actions, the percentage-of-the-fund method and the lodestar method. *Maley*, 186 F. Supp. 2d at 369. Although the Second Circuit has held that courts may use either method when determining an award of attorneys' fees, "[t]he trend in this Circuit is toward the percentage method . . . which 'directly aligns the interests of the class and

its counsel and provides a powerful incentive for the efficient prosecution and early resolution of the litigation.'" *Wal-Mart Stores, Inc. v. U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005).

Thus, the Second Circuit has found the percentage method for calculating attorneys' fees in class actions to be a viable procedure in this Circuit. *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 49 (2d Cir. 2000) (citing *Savoie v. Merch. Bank*, 166 F.3d 456, 460 (2d Cir. 1999)). Indeed, the *Goldberger* court held that as long as utilizing the percentage of recovery methodology does not produce an "unwarranted windfall[]" to counsel, there is "no need to compel district courts to undertake the 'cumbersome, enervating, and often surrealistic process' of lodestar computation." *Id.* at 49-50 (citation omitted).[7] The *Goldberger* court also concluded that the lodestar method is also a viable means for calculating attorneys' fees in this Circuit; and that even if a court used the percentage-of-the-fund method, the court is still "encourage[d]" to analyze counsel's lodestar "as a 'cross check' on the reasonableness of the requested percentage." *Id.* at 50 (citation omitted); *see also Veeco*, 2007 U.S. Dist. LEXIS 85554, at *39 (employing percentage method with lodestar 'cross-check'). Thus, although in recent years the percentage-of-recovery method has become the prevailing method for awarding fees in common fund cases in this Circuit and throughout the United States, *see In re EVCI Career Colleges Holding Corp. Sec. Litig.*, No. 05 Civ. 10240 (CM), 2007 U.S. Dist. LEXIS 57918, at *44-*46 n.3 (S.D.N.Y. July 27, 2007) (noting that the percentage method, in addition to being the trend of district courts in this Circuit, "has been expressly adopted in the vast majority of circuits"), either the percentage or lodestar/multiplier method may be applied by a court to determine an attorney fee award.

[7] While the Court of Appeals for the Second Circuit encourages use of the lodestar method as a "cross check," it has acknowledged that the lodestar method on its own "proved vexing" and resulted in "an inevitable waste of judicial resources." *Goldberger*, 209 F.3d at 48-49; *Savoie*, 166 F.3d at 460 ("percentage-of-the-fund method has been deemed a solution to certain problems that may arise when the lodestar method is used in common fund cases").

No matter which method is chosen -- the percentage method or the lodestar method -- the fees awarded in common fund cases must be fair and reasonable under the circumstances of a particular case. *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989) (recognizing that an appropriate fee is intended to approximate what counsel would receive if they were bargaining for the services in the marketplace). Further, regardless of which method is applied, courts in the Second Circuit also consider traditional criteria that reflect a reasonable fee in common fund cases, including: (i) the time and labor expended by counsel; (ii) the risks of the litigation; (iii) the magnitude and complexity of the litigation; (iv) the requested fee in relation to the settlement; (v) the quality of representation; and (vi) public policy considerations. *Goldberger*, 209 F.3d at 50. Lead Counsel respectfully submit that an analysis of these six *Goldberger* factors, as well as an analysis under the percentage-of-the-fund and lodestar methods, demonstrate that their Fee Request is reasonable and appropriate and should be approved by the Court in full.[8]

C. The Requested Fees Are Reasonable Under the Lodestar Method

1. The Labor Dedicated by Lead Counsel Justifies the Attorneys' Fees Requested

The starting point for any lodestar analysis is the calculation of the lodestar -- which is "comprised of the amount of hours devoted by counsel multiplied by the normal, non-contingent hourly billing rate of counsel." *Prudential*, 985 F. Supp. at 414. In total, as set forth in the lodestar submissions attached to the Brower Declaration, Lead Counsel devoted 3,827.35 hours to this Action. Brower Decl. ¶ 78. Accordingly, the requested fee in this Action not only

[8] Lead Counsel are providing the necessary information for the Court to perform its analysis using either the percentage-of-the-fund method or the loadstar/multiplier method. An analysis of the lodestar and percentage methods are presented herein at §II(C) and §II(D), respectively.

represents a reasonable percentage of the benefit obtained, but also represents an 81% to 89% discount of Lead Counsel's lodestar amount. Brower Decl. ¶ 86.

The Settlement now before the Court is the culmination of nearly four years of extensive litigation and thousands of hours of hard work by Lead Counsel. As discussed below, the Settlement was reached on the eve of what promised to be a complex and contentious trial. Furthermore, Lead Counsel secured the Settlement due to the exhaustive efforts they exerted in this matter including, *inter alia*: (i) conducting a factual investigation into the Class' claims that included a review and analysis of financial information obtained from various public sources; (ii) using the investigation to draft the consolidated amended complaint; (iii) successfully opposing a motion to dismiss; (iv) prosecuting a hotly disputed motion to certify the Class and defeating the attempted Fed. R. Civ. P. 23(f) appeal of that determination; (v) completing extensive document discovery that ultimately involved the review and organization of tens-of-thousands of pages of hard-copy and electronic documents produced by Defendants and third-parties; (vi) developing an in-depth understanding of the complex and unique factual issues involved in this Action; (vii) engaging and resolving a multitude of discovery disputes regarding the timing and sufficiency of Defendants' production of documents, including the exchange of myriad letters, emails, and telephone calls; (viii) consulting extensively with an expert in the areas of damages and market efficiency; (ix) opposing Defendants' motion to transfer the action to Puerto Rico, and an ensuing motion for reconsideration; (x) obtaining a default judgment against Inyx and one of the Individual Defendants prior to trial and conducting a subsequent inquest on damages; and (xi) drafting required pretrial materials, including jury instructions, witness and exhibit lists, and motions *in limine* in preparation for an imminent trial. Brower Decl. ¶¶ 21-50. As noted above, Lead Counsel respectfully direct the Court to the Brower Declaration for the details of Lead Counsel's efforts.

The negotiations leading up to the Settlement also required exhaustive and expedited efforts by Lead Counsel. From February 3, 2012 to February 9, 2012, the parties engaged in extended and complicated arms-length settlement discussions.[9] Due to Defendants' limited financial resources, *see* Brower Decl. ¶ 54, reaching a settlement that would ensure a benefit to the Class required significant time, effort and ingenuity on behalf of both parties. On February 9, 2012, after extended arms-length negotiations, the parties submitted to the Court the Stipulation, along with the necessary orders and notices for preliminary approval. *See* Brower Decl. ¶¶ 47-50.[10] Absent Lead Counsel's experience and skill in class action litigation of this type, it would have been virtually impossible to complete the negotiations and necessary paper work for a settlement of this type in such a short period of time.

2. The Rates Charged By Lead Counsel Are Reasonable

The second step in the lodestar analysis is to test the reasonableness of the current billing rates charged by plaintiff's counsel.[11] In determining the propriety of the hourly rates charged by counsel in class actions, courts have continually held that the standard is the rate charged in the community where the services were performed for the type of service performed by counsel.

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[9] Prior to February 2012 Lead Plaintiff and Defendants had, at various times engaged in Settlement discussions. While these talks seemed at various junctures as if they might yield a resolution to the Action, a final compromise that would benefit the Class was never achieved during these prior discussions.

[10] Furthermore, Lead Counsel will continue to perform legal work on behalf of the Class should the Court approve the proposed Settlement. Additional resources will be expended assisting Class Members with their Proofs of Claim and related inquiries and working with GCG to ensure the smooth progression of claim processing, and moving the Court for a final distribution order.

[11] The Supreme Court and other courts have held that the use of current rates is proper since such rates compensate for inflation and the loss of use of funds. *See, e.g., Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989) ("an appropriate adjustment for delay in payment" by applying "current" rate is appropriate); *Gierlinger v. Gleason*, 160 F.3d 858, 882 (2d Cir. 1998) (rates "should be 'current rather than historic'") (citation omitted); *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 764 (2d Cir. 1998) (current rates "should be applied in order to compensate for the delay in payment").

See, e.g., Luciano v. Olsten Corp., 109 F.3d 111, 115-16 (2d Cir. 1997) ("The 'lodestar' figure should be 'in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'") (quoting *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984)); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998) (appropriate rate in performing lodestar analysis is "the rate 'normally charged for similar work by attorneys of like skill in the area,' taking into account factors such as the experience of the attorney performing the work and the type of work performed") (quoting *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1098 (2d Cir. 1977)).

Perhaps the best indicator of the "market rate" in the New York area for Lead Counsel in securities class actions is the rates charged by the large New York law firms that typically *defend* securities class actions where partner rates now routinely exceed $1,000 per hour.[12] Viewed in light of that market barometer, Lead Counsel's rates are entirely reasonable. The current hourly rates of the partners who performed the vast majority of the partner-level work in this Action range from $850 to $750 per hour. *See* Brower Decl. ¶78. Likewise, the non-partner attorneys' rates charged by Lead Counsel range from a low of $300 per hour to a high of $550 per hour. *See id*. These hourly rates fall well within the norm of the rates charged by the defense bar for similar work. Further, courts in this District and around the country have repeatedly found rates charged by Lead Counsel in class actions that are comparable to this Action to be reasonable given the nature of such work and the risks associated with financing class actions for long periods of time -- in this case, nearly four years.

[12] *See* Jones, Leigh, *Law Firm Fees Defy Gravity*, THE NATIONAL LAW JOURNAL, Vol. 31, No. 15 (Dec. 8, 2008) (providing summary of results from survey of 127 of the nation's largest law firms for the period October 1, 2007 to September 30, 2008 where partner billing rates were as high as $1,260 per hour and associate billing rates were as high as $920 per hour).

3. The Application of a Negative Multiplier

Courts have continually recognized that, in instances where a lodestar analysis is employed to calculate attorneys' fees or used as a "cross check" for a percentage of recovery analysis, counsel may be entitled to a "multiplier" of their lodestar rate to compensate them for the risk assumed by them, the quality of their work and the result achieved for the class.[13] Accordingly, multipliers of between three and four times a successful plaintiff's counsel's lodestar have been routinely awarded in this Circuit. *See*, *e.g.*, *Maley*, 186 F. Supp. 2d at 369 (awarding fee equal to 4.65 multiplier, which was "well within range awarded by courts in this Circuit and courts throughout the country"); *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998) (approving multiplier of 3.97 and noting that "'[i]n recent years multipliers of between 3 and 4.5 have become common'") (citation omitted); *EVCI*, 2007 U.S. Dist. LEXIS 57918, at *56 (2.48 multiplier "is within the range found to be reasonable"). Here, Lead Counsel devoted 3,827.35 hours to this Action, amounting to $1,889,404.75 in billable time. As a result, Lead Counsel's request for 33 1/3% of the Settlement Amount, or between $366,666.67 and $200,000.00 (depending on the final size of the Settlement Amount), amounts to substantially less than the straight time spent on this case, without any augmentation. Brower Decl. ¶¶ 77, 86. In other words, Lead Counsel's request for attorneys' fees reflects a discount on the time Lead Counsel actually spent litigating the matter and requires the application of a ***negative multiplier*** to the lodestar. This fact militates in favor of the reasonableness of Lead Counsel's Fee Request, particularly in light of the fact that courts

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[13] *See, e.g.*, *In re Linerboard Antitrust Litig.*, No. MDL 1261, 2004 WL 1221350, at *16 (E.D. Pa. June 2, 2004) (multiplier used to "reflect the risks of nonpayment facing counsel, to serve as an incentive for counsel to undertake socially beneficial litigation, or as a reward to counsel for an extraordinary result"); *Goldberger*, 209 F.3d at 54 ("We have historically labeled the risk of success as 'perhaps the foremost' factor to be considered in determining whether to award an enhancement.") (citation omitted); *see also Prudential*, 985 F. Supp. at 414.

generally grant fees with positive multiples to reflect the complexity and risks undertaken by class counsel. Brower Decl. ¶¶ 79-82.

Courts have repeatedly recognized that the reasonableness of the fee request under the percentage method "is reinforced by evidence that the percentage fee would represent a negative multiplier of the lodestar." *In re Blech Sec. Litig.*, 94 CIV. 7696 (RWS), 2000 WL 661680, at *5 (S.D.N.Y. May 19, 2000); *see also Spann v. AOL Time Warner*, No. 02 Civ. 8238DLC, 2005 WL 1330937, at *8-*9 (S.D.N.Y. June 7, 2005) (approving attorneys' fees of one-third of the settlement fund where "Lead Counsel's lodestar amount exceed[ed] by several thousand dollars the amount of fees requested as part of the Settlement Agreement"). Indeed, "the fact that any reasonable fee would necessarily represent a negative multiplier of the lodestar supports an award at the higher end of the spectrum." *In re Sterling & Foster, Inc. Sec. Litig.*, 238 F. Supp. 2d 480, 490 (E.D.N.Y. 2002) (quoting *Baffa v. Donaldson Lufkin & Jenrette Secs. Corp.*, No. 96 Civ. 0583, 2002 WL 1315603, at *2 (S.D.N.Y. June 17, 2002)); *Nilson v. York County*, 400 F. Supp. 2d 266, 271 (D. Me. 2005) ("When the lodestar cross-check shows that the percentage fee is lower than the fee the lawyers have accrued on a time-and-service basis, it is relatively easy to support a percentage-based fee."); *Blech*, 2000 WL 661680, at *5 (reasonableness of plaintiffs' request for fees "is reinforced by evidence that the percentage fee would represent a negative multiplier of the lodestar . . .").[14] Thus, the lodestar approach also clearly demonstrates that Lead Counsel's Fee Request is reasonable.

[14] It bears mentioning that the Notice advised the Class that Lead Counsel would be seeking up to 35% of the Settlement Amount, rather than 33 1/3%, and that the negative multiplier would also have supported a 35% award, *see In re Sterling & Foster, Inc. Sec. Litig.*, 238 F. Supp. 2d at 490 ("the fact that any reasonable fee would necessarily represent a negative multiplier of the lodestar ***supports an award at the higher end of the spectrum***") (citations omitted; emphasis added).

D. Lead Counsel's Requested Fee Percentage Is Reasonable Under Percentage Method

On a percentage basis, the amount of attorneys' fees requested are consistent with attorneys' fee awards made by courts in this District and other courts within the Second Circuit. *See, e.g., In re APAC Teleservices, Inc. Sec. Litig.*, No. 97-9145, 1999 WL 1052004, at *1 (S.D.N.Y. Nov. 19, 1999) (awarding 33 1/3% of $21 million settlement). Thus, Lead Counsel's request for a fee of 33 1/3% of the Settlement Fund is reasonable in relation to fees awarded in complex class actions by courts in this Circuit and throughout the country.[15] Furthermore, as demonstrated below, the Fee Request here is fully supported by the *Grinnell*/*Goldberger* factors.

1. The Time And Labor Expended By Lead Counsel Are Reasonable

As is detailed above and in the Brower Declaration, Lead Counsel expended substantial time and effort to bring this litigation to a successful resolution. In total, Lead Counsel has spent nearly four years and 3,827.35 hours litigating this matter, resulting in a total lodestar of $1,889,404.75. Brower Decl. at ¶ 78. Given the significant amount of time devoted by Lead Counsel in zealously prosecuting this Action, notwithstanding the serious risk to collecting on an ultimate judgment, the "time and labor expended by counsel" clearly supports the fees requested by Lead Counsel.

2. The Magnitude And Complexity Of This Litigation Support The Fee Requested By Lead Counsel

This case, like virtually all securities actions, was inherently complex. *See In re Gilat Satellite Networks, Ltd.*, CV-02-1510 (CPS), 2007 U.S. Dist. LEXIS 29062, at *36 (E.D.N.Y.

[15] *See, e.g., In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 84-85 (D. Mass. 2005) (awarding 33% of $67 million settlement fund); *In re Ravisent Techs., Inc. Sec. Litig.*, No. 00-1014, 2005 WL 906361, at *15 (E.D. Pa. Apr. 18, 2005) (awarding one-third of $7 million settlement fund); *In re Corel Corp. Sec. Litig.*, 293 F. Supp. 2d 484, 497 (E.D. Pa. 2003) ("[T]he 33 1/3% fee request in this complex case is within the reasonable range."); *Faircloth v. Certified Fin. Inc.*, No. 99-3097, 2001 WL 527487, at *12 (E.D. La. May 16, 2001) (awarding attorneys' fees of 35% of settlement fund).

Apr. 19, 2007) ("Securities class actions are generally complex and expensive to litigate."); *In re Bristol-Myers Squibb Sec. Litig.*, 361 F. Supp. 2d 229, 234 (S.D.N.Y. 2005) (evaluating complexity of securities class actions in comparison to other securities fraud class actions). Furthermore, absent the Settlement, Class Members may not benefit from a recovery, if any, for years. When taking into consideration the risks of a trial and the inevitable appeals that would have followed, *see In re Bristol-Myers Squibb*, 361 F. Supp. 2d at 234, Lead Counsel's ability to tackle a case of substantial magnitude and complexity, and produce a beneficial result for the Class fully supports the requested fee.

3. The Substantial Risks to Plaintiffs' Recovery Fully Support The Fee Requested By Lead Counsel

The Second Circuit has identified "the risk of success as 'perhaps the foremost' factor to be considered in determining [a reasonable award of attorneys' fees]." *Goldberger*, 209 F.3d at 54; *In re Telik*, 576 F. Supp. 2d at 592 ("Courts have repeatedly recognized 'that the risk of the litigation' is a pivotal factor in assessing the appropriate attorneys' fees to award to Lead Counsel in class actions."). Here, Lead Counsel faced significant risks to obtaining a recovery for the Class or collecting upon such a recovery if the Action continued and, thus, receive no payment for their efforts.[16]

a. The Risk to Establishing Liability and Damages

As in any securities litigation, Plaintiff faced risks at trial and on appeal of prevailing on his securities fraud claims. *See In re Michael Milken & Assoc. Sec. Litig.*, 150 F.R.D. 46, 53 (S.D.N.Y. 1993) (when evaluating securities class action settlements, courts have long

[16] In assessing the relationship of the risks presented by this litigation to the appropriate fee to be awarded to Lead Counsel, the Court should consider the risks facing counsel at the time the case was instituted. *See Goldberger*, 209 F.3d at 55 ("It is well-established that litigation risk must be measured as of when the case is filed."); *DiFilippo v. Morizio*, 759 F.2d 231, 234 (2d Cir. 1985) (analysis should not be based on "hindsight," but rather "an *ex ante* determination").

recognized such litigation to be "'notably difficult and notoriously uncertain'") (quoting *Lewis v. Newman*, 59 F.R.D. 525, 528 (S.D.N.Y. 1973)). Further, whiles Lead Counsel were confident that they would ultimately prevail on the merits, the risk of non-collectability of a judgment greater than the Settlement was very real.

b. The Risk of Contingent Litigation

Lead Counsel also undertook this Action in July 2008 -- nearly four years ago -- on an entirely contingent fee basis, assuming the risks of surviving dispositive motions, obtaining class certification, proving falsity, scienter, loss causation and damages, and litigating the Action through trial and likely appeals. *See In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 432-33 (S.D.N.Y. 2001) ("[It is] appropriate to take this [contingent fee] risk into account in determining the appropriate fee to award.") (citing *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 226, 236 (2d Cir. 1987)); *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 747 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986) ("Numerous cases have recognized that the attorneys' contingent fee risk is an important factor in determining the fee award."). Lead Counsel understood from the outset that they were embarking on a complex, and potentially expensive and lengthy litigation, which would require the investment of thousands of hours of attorney time, with no guarantee of ever being compensated for their investment of such time and money. Lead Counsel also understood that Defendants would (and, in fact, did) vigorously defend this action. Brower Decl. ¶¶ 21-50.

In undertaking this risk, Lead Counsel were obligated to ensure that sufficient attorney resources were dedicated to the prosecution of this Action. Moreover, Lead Counsel have not been compensated for any of their time or expenses during the nearly four years that this Action has been pending. Despite the risk of receiving no payment if their efforts proved futile, Lead Counsel advanced millions of dollars of time and expense in litigating the Class' claims. Brower

Decl. ¶ 78, 89. *See In re Tyco Int'l, Ltd. Sec. Litig.*, 535 F. Supp. 2d at 268 (noting that "had [Lead Counsel] lost on summary judgment or fallen short of establishing liability at trial, they would have lost the [hundreds of thousands] of dollars in expenses and all of the attorney time that they collectively invested in the case"); *Maley*, 186 F. Supp. 2d at 372 ("Class Counsel undertook a substantial risk in absolute non-payment in prosecuting this action, for which they should be adequately compensated.").

In addition to advancing litigation expenses and paying their not insubstantial overhead required to provide the Class with the services of up-to-date modern law firms, Lead Counsel were mindful that in numerous cases, plaintiffs' counsel working on a contingent basis, such as this, have expended thousands of hours only to receive no compensation. There have been many hard-fought lawsuits where, because of (i) the discovery of facts unknown when the case was commenced, (ii) changes in the law while the case was pending, or (iii) decisions of judges or juries following a trial on the merits, that excellent professional efforts of members of the plaintiffs' bar produced no fee for counsel. Losses such as these are exceedingly expensive.[17] Thus, there existed a demonstrable risk that Lead Counsel would invest substantial efforts and receive nothing, and this factor counsels strongly in favor of Lead Counsel's Fee Request.

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[17] There have been numerous class actions in which plaintiffs' counsel expended thousands of hours and advanced significant litigation expenses and yet received no remuneration whatsoever, despite their diligence and expertise. *See, e.g.*, *Brieger v. Tellabs, et al.*, No. 06 C 1882, slip op. (N.D. Ill. June 1, 2009) (plaintiffs lost a trial in an ERISA litigation, despite spending thousands of hours preparing and trying the case). Even a successful jury verdict for plaintiffs is no guarantee of a recovery. *See In re Apollo Group, Inc. Sec. Litig.*, No. CV 04-2147-PHX-JAT, 2008 U.S. Dist. LEXIS 61995 (D. Ariz. Aug. 4, 2008) (granting judgment to defendants and nullifying a unanimous jury verdict for plaintiffs following a two month trial); *see also Miller v. Thane, Int'l, Inc.*, 372 F. Supp. 2d 1198 (C.D. Cal. 2005) (defense verdict after bench trial); *Winkler v. NRD Mining, Ltd.*, 198 F.R.D. 355 (E.D.N.Y. Mar. 31, 2000) (granting defendants' motion for judgment as matter of law after jury verdict for plaintiffs); *Robbins v. Koger Props.*, 116 F.3d 1441 (11th Cir. 1997) (jury verdict of $81 million for plaintiffs against an accounting firm reversed on appeal on loss causation grounds and judgment entered for defendant).

4. The Quality Of Lead Counsel's Representation Of The Class Supports The Fee Requested

In evaluating the "quality of representation," courts in the Second Circuit have "review[ed] the recovery obtained and the backgrounds of the lawyers involved in the lawsuit." *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 141 (S.D.N.Y. 2008). Lead Counsel, the law firm Brower Piven, practices extensively in the highly complex field of shareholder securities litigation and has successfully litigated these types of actions in courts throughout the country. The experience of Lead Counsel is set forth Exhibit 2 attached to the Brower Declaration. Further, given nearly four years of litigation before this Court, the Court is well-positioned to reach its own conclusion from its experience as to the quality of representation the Class received in this Action.

5. The Fee Requested Is Fair In Relation To The Settlement Amount

Courts reach their conclusion whether a particular percentage fee award is reasonable based either on a comparison to fee awards in comparable cases, *see, e.g.*, *Taft v. Ackermans*, No. 02 Civ. 7951(PKL), 2007 WL 414493, at *10 (S.D.N.Y. Jan. 31, 2007), or "based on the unique circumstances of each case." *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 246 F.R.D. 156, 174 (S.D.N.Y. 2007) (citations and quotations omitted); *see also, e.g., Ling v. Cantley & Sedacca, L.L.P.*, No. 04 Civ.4566 (HB), 2006 WL 290477, at *3 (S.D.N.Y. Feb. 8, 2006) (stating that relationship of fee request to settlement should be "based on the characteristics of [each] particular case"). The Fee Request -- 33 1/3% of the Settlement Fund -- is reasonable when viewed as a percentage of the recovery, and is neither extraordinary nor unusual. Ample precedent exists in this Circuit for granting fees in the amount of 33 1/3% or more where a common fund has been created. *See e.g., Maley*, 186 F. Supp. 2d at 368 (awarding Lead Counsel a fee equal to one-third of settlement fund); *see also supra* II(D) for a list of similar fee awards.

Therefore, given the risk involved and the substantial time Lead Counsel expended litigating this case to a positive result for the Class (3,827.35 hours), Lead Counsel's request for 33 1/3% of the Settlement Amount is reasonable

6. Public Policy Considerations Fully Support The Fee Requested

The federal securities laws are remedial in nature, and, to effectuate their purpose of protecting investors, the courts must encourage private lawsuits. *See Basic Inc. v. Levinson*, 485 U.S. 224, 230-31 (1988). "A strong public policy concern exists for rewarding firms for bringing successful securities litigation." *In re Ashanti Goldfields Sec. Litig.*, No. 00-717, 2005 WL 3050284, at *5 (E.D.N.Y. Nov. 15, 2005); *In re Bristol-Myers Squibb Sec. Litig.*, 361 F. Supp. 2d 229, 236 (S.D.N.Y. 2005) ("public policy supports granting attorneys fees that are sufficient to encourage Lead Counsel to bring securities class actions that supplement the efforts of the SEC"). Lead Counsel in complex securities class action litigation are invariably retained on a contingent basis, largely due to the scope of the commitment of time and expense required. Indeed, lawyers who pursue private suits such as this one on behalf of investors augment the overburdened SEC by "acting as 'private attorneys general.'" *Ressler v. Jacobson*, 149 F.R.D. 651, 657 (M.D. Fla. 1992) (citation omitted). In addition, the typical class representative is unlikely to be able to pursue long and protracted litigation at their own expense. Thus, "public policy favors the granting of [attorneys'] fees sufficient to reward counsel for bringing these actions and to encourage them to bring additional such actions." *Id.*[18]

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[18] *See also Hicks*, 2005 WL 2757792, at *9 ("To make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding.") (citation omitted); *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 524 (E.D.N.Y. 2003) ("There is . . . commendable sentiment in favor of providing lawyers with sufficient incentive to bring common fund cases that serve the public interest") (citing *Goldberger*, 209 F.3d at 51); *Maley*, 186 F. Supp. 2d at 373 ("In considering an award of attorney's fees, the public policy of vigorously enforcing the federal securities laws must be considered."); *Med. X-Ray*, 1998 WL 661515, at *8 (awarding fee of 33 1/3% because it

Here the Settlement provides the only monetary recovery for Class Members, and Lead Counsel's efforts served as a necessary supplement to government enforcement which is necessary and desirable because the SEC, a vital but understaffed government agency, does not have the budget to ensure complete enforcement of the securities laws. *See Tellabs*, 127 S. Ct. at 2504 ("meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions . . ."). Absent Lead Counsel's willingness to assume the risks set forth herein, and vigorously litigate this Action to the point where the parties' were on the eve of trial, the Class would not have recovered anything, let alone the recovery of between $600,000 and $1,100,000 obtained by the Settlement. Brower Decl. ¶ 87. Moreover, Lead Counsel are not seeking a bonus for their efforts as the requested fee award is approximately 81% to 89% ***less*** than their actual time billed over nearly four years. Therefore, public policy favors compensating Lead Counsel for their commitment of time and expenses in pursuing the Action.

E. Absence of Objections to the Fee Request Demonstrates it is Reasonable

As discussed in the accompanying Brower Declaration, over 6,000 copies of the notice were disseminated to potential Class members and the summary notice was published on three staggered occasions over the leading national business newswires. The notice described the Fee Request in detail and stated that Lead Counsel would seek up to 35% of the settlement Fund as compensation for their efforts in prosecuting the Action. The Notice also indicated that all Class Members had the right to object to the fee request and when and how to lodge any such objection. The deadline for objections passed on April 9, 2012. Even though the actual amount of fees requested by Lead Counsel is less than disclosed in the Notice, to date, no object to the Fee Request has been received. The lack of objections, in this day and age, is not only

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"furthers the public policy of encouraging private lawsuits").

remarkable, but militates in favor of approval of the Fees as requested. *See In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 478 (S.D.N.Y. 1998) ("[i]n litigation involving a large class, it would be 'extremely unusual' not to encounter objections.").

III. THE REQUEST FOR REIMBURSEMENT OF EXPENSES IS REASONABLE

Lead Counsel also request reimbursement of their out-of-pocket expenses, in the amount of $105,594.24, incurred in connection with the prosecution of the Action on behalf of the Class. It is well established that counsel who create a common fund are entitled to the reimbursement of expenses that they advanced to a class. *See, e.g.*, *Teachers' Ret. Sys.*, 2004 WL 1087261, at *6; *Am. Bank Note*, 127 F. Supp. 2d at 430. Particular costs are compensable if they are of the type normally billed by attorneys to paying clients. *E.g., Mitland Raleigh-Durham v. Myers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993). Courts have awarded such expenses so long as counsel's documentation of them is "adequate." *NASDAQ*, 187 F.R.D. at 489.

As demonstrated in the chart at ¶ 89 of the accompanying Brower Declaration, Lead Counsel's expenses were spent on Plaintiffs' investigation, experts, photocopying of documents, on-line research, messenger services, postage, express mail, travel and other incidental expenses directly related to the prosecution and settlement of this Action. Brower Decl. ¶ 89. These expenses are of the type that law firms typically bill to their clients.[19] Although, the Notice indicated Lead Counsel would seek reimbursement of expenses in an amount not to exceed $110,000, the Reimbursement Request is actually less. Nevertheless, to date, no objections have been received regarding Lead Counsel's Reimbursement Request. Accordingly, Lead Counsel respectfully submit that their Reimbursement Request is reasonable and should be granted.

[19] *See, e.g.*, *LeBlanc-Sternberg*, 143 F.3d at 763; *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 570 (7th Cir. 1992).

IV. INTEREST ON AWARDS OF FEES AND EXPENSES

It is also appropriate that the award of attorneys' fees and reimbursement of expenses should include interest under the same conditions and at the same rate as the interest being earned by the Settlement Fund starting from the date of the award by the Court. *See In re "Agent Orange" Prods. Liab. Litig.*, 611 F. Supp. 1296, 1328-29 (E.D.N.Y. 1985) (each firm received a percentage of the interest accrued equal to the percentage of the settlement fund that it received as attorneys' fees), *aff'd in part, rev'd in part on other grounds*, 818 F.2d 226 (2d Cir. 1987).

V. CONCLUSION

For the reasons set forth herein and in the Brower Declaration incorporated herein by reference, Lead Counsel respectfully request that the Court approve and enter an order for: (i) an award of attorneys' fees in the amount of one third (33 1/3%) of the Settlement Amount, or between $366,666.67 and $200,000.00 (depending on the final size of the Settlement Fund); (ii) reimbursement of litigation expenses in the amount of $105,594.24; and (iii) any interest earned on those amounts at the same rate earned by the Settlement Fund from the date of the award to the date of payment.

Dated: April 27, 2012

Respectfully submitted,

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